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June 6, 2006

TO: Nancy Lyons, Deputy Executive Director
Little Hoover Commission

FROM: Kevin R. Reitz

RE: **Written Materials for June 22 Hearing**

This memorandum accompanies the written materials I have submitted in anticipation of my testimony at the Commission's hearing on June 22, 2006. The written materials are voluminous, and represent the current work product in the American Law Institute's project to revise the sentencing articles of the Model Penal Code. I am the Reporter for that project, which will be the first-ever revision of the Model Penal Code. Because of the significance of the ALI's effort, the Commission should be apprised of its present status. The materials are lengthy, however, so this memorandum will offer advice for selective reading by Commission members.

I have transmitted two documents to the Commission. The first is the *Model Penal Code: Sentencing, Report* (2003), which describes the general outlines and intentions of the revision project. For present purposes, the relevant portions of the *Report* are those that discuss the advisability of a sentencing structure that includes a permanent sentencing commission empowered to create sentencing guidelines. This is the meat of the *Report*. An overview is presented on pages 41-50, with an extended discussion on pages 63-115. Within this longer section, I would particularly direct Commissioners' attention to the section on "resource management" at pages 72-85. Given the racial and ethnic composition of California's prisons, the discussion of "racial and ethnic overrepresentations in punished populations," at pages 89-106, may also be of special interest.

The second document is the *Model Penal Code: Sentencing, Discussion Draft* (2006), which was presented for discussion at the annual meeting of the ALI this past spring. The *Discussion Draft* contains proposed black letter statutory provisions, and proposed official commentary, for the revised Model Penal Code. The *Discussion Draft* is not a complete revision of the Code's sentencing provisions, but is a major first installment in the larger project. The *Discussion Draft*'s contents have not yet been adopted by the ALI, but they reflect four years of work by the Reporter, the Advisors to the sentencing project assembled by the ALI, the Members Consultative Group (made up of interested ALI members), and the ALI Council.

The *Discussion Draft* presents two alternative sentencing systems that would be recommended to individual states, depending on their local needs and conditions. Both sets of recommendations include the chartering of a permanent sentencing commission with an appreciable research capacity, and with authority to author guidelines to help structure the sentencing discretion of trial judges. In the main body of recommendations (pages 13-263 of the *Discussion Draft*), these guidelines would hold "presumptive" legal force, but could be overridden by the trial court for "substantial reasons" set forth on the record. The

presumptive guidelines system is intended to be legally enforceable only to a modest degree. It has been the intent of the drafters throughout to preserve meaningful judicial discretion to individualize sentences in light of the circumstances of specific cases within a framework of benchmarks—or starting points—provided by guidelines. The *Discussion Draft*, in Appendix A, also assembles recommendations for those states that choose to empower a sentencing commission to author only “advisory” guidelines. These would not in themselves be legally binding on a trial court, although trial-court departures from advisory guidelines would be subject to appellate review. (See pages 265-308.) Both the presumptive and advisory guidelines systems in Model Penal Code drafting are designed to comply with the Supreme Court’s recent Sixth Amendment sentencing decisions in *Blakely v. Washington* (2004), and *United States v. Booker* (2005).

For the Commission’s present purposes, the advisability of a sentencing commission in the first instance is the question of primary importance—the eventual authorities to be given a commission or its guidelines are issues that lie in the future. The sentencing commission, and its responsibilities, are the subjects of Part 6A of the *Discussion Draft* (pages 39-116). Within Part 6A, particular attention might be directed to § 6A.01 (“Establishment and Purposes of Sentencing Commission”) at pages 39-48. In addition, Commissioners may be particularly interested in § 6A.07 (“Projections Concerning Fiscal Impact, Correctional Resources, and Demographic Impacts”), at pages 99-106. These provisions, for a presumptive guidelines system, are essentially similar to their counterparts in Appendix A, for an advisory guidelines structure.

I thank the Commission for the opportunity to give testimony and provide these materials. I would welcome inquiries from Commissioners before, during, or after the June 22 hearing.